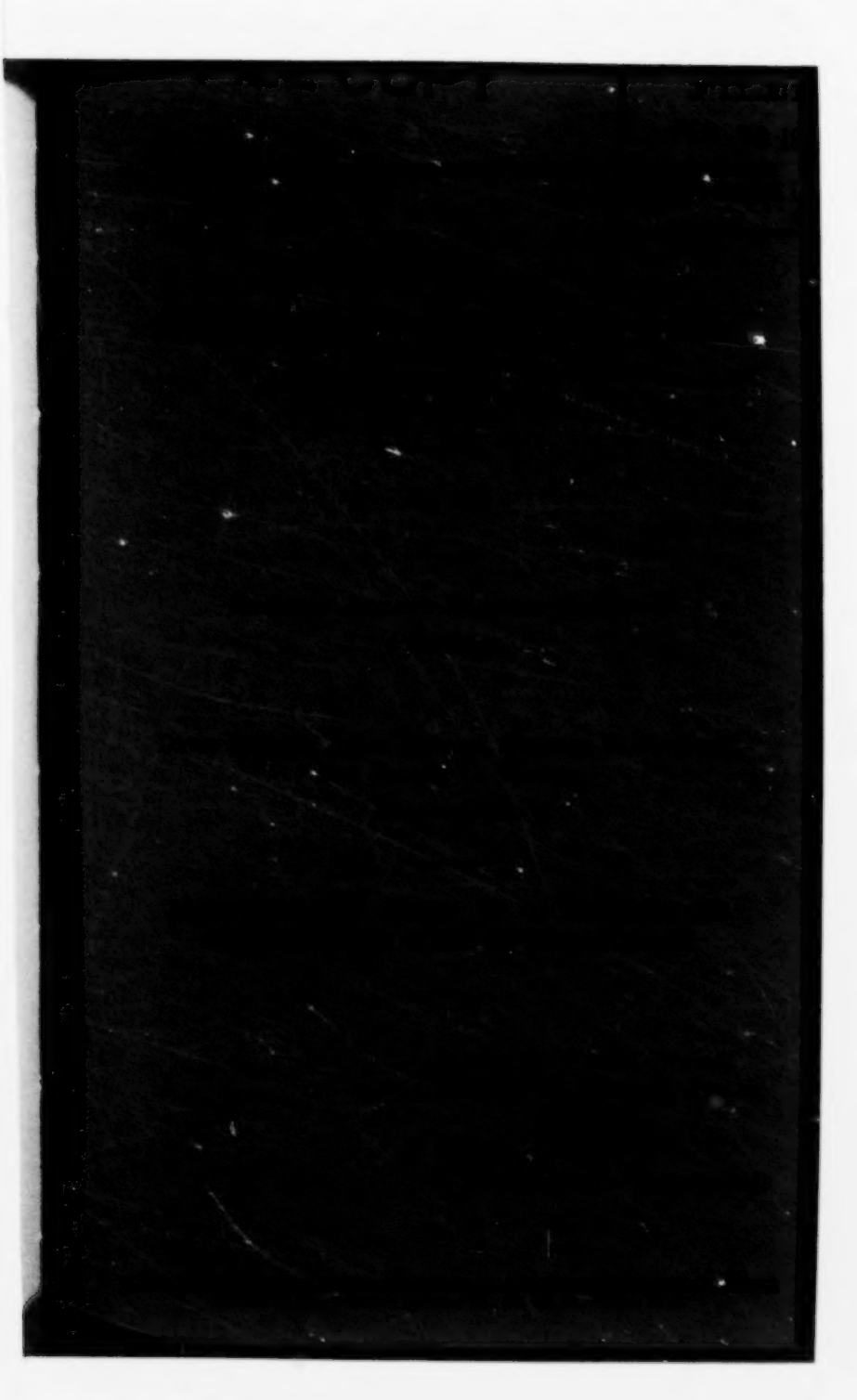

INDEX

	Page
PRELIMINARY STATEMENT	1
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
FACTS	2
THE HINTON CASE	3
THE PALMER ACTION	6
MORE HINTON CASE	9
QUESTION PRESENTED	10
SUMMARY OF ARGUMENT	10
ARGUMENT	11
PRELIMINARY	
I. The Palmer case is not such a reiteration of the Hinton case as to make it sufficiently the same cause of action to bring it within the lis pendens of the Hinton case	12
II. While respondent Wright might have intervened in the Hinton case to assert his cause of action alleged in the Palmer case he was not required to do so and the Virginia Court erred when it enjoined him and his counsel from prosecuting the Palmer case in the District of Columbia Court	16
III. The petition of the Seaboard to restrain respondent Wright and his counsel from prosecuting the Palmer case constituted a collateral attack on the order of the District of Columbia Court denying the Seaboard's motion to dismiss or stay	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases

American Life Ins. Co. v. Steward, 300 U. S. 203 17
Brotherhood, etc. v. Tunstall, 163 F. 2d 289 ..... 4, 12
54 C. J. S. "Lis Pendens," Sec. 4, p. 574 15
Crosley Corporation v. Hazeltine Corporation, 2 Cir, 122 F. 2d 925 ..... 10, 15
Hinton, et als, v. Seaboard Air Line Railroad Co., et al 170 F. 2d 892 ..... 13, 14, 15, 20
Landis v. North American Co., 299 U. S. 248 17

Page

Miller v. U. S. Gypum Co., 96 F. 2d 69 16

Old Charter Distilling Co. v. Continental Distilling Co., 50 F. Supp. 528 (D. C. Del.) 17

Sorley v. Brewer, 18 How. Pr. (N. Y.) 509 18

Steele v. L & N. R. R. Co., 323 U. S. 192 ..... 4, 10, 12, 14

Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, 67 L. Ed. 719 18, 19

Tunstall v. Brotherhood, et al, 69 F. Supp. 826 (U. S. D. C., E. D. Va.) 18

Tunstall v. Brotherhood, etc., et al., 323 U. S. 210 ..... 4, 12

Wallace, M. & Co. v. Leber, 67 N. J. L. 26, 50 A. 586 18

STATUTES

45 U. S. C. A., Sections 152, et seq. 10, 14, 15

In The

Supreme Court of the United States

October Term, 1948

No. 545

Seaboard Airline Railroad Company,
Petitioner,

v.

David Hinton, Adam Wright, Charles H. Houston, and Joseph C. Waddy,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Respondents file this brief in opposition to the granting of the Writ of Certiorari sought herein by the Seaboard Air Line Railroad Company and shows to the Court that there are not present in this case any of the special and important reasons that warrant the granting of the writ.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals, Fourth Circuit, is reported in 170 F. 2d 892 and is printed in full as Appendix A to Petitioner's Brief. The memorandum of the United States District Court is set out in the Transcript of Record herein beginning at page 83.

JURISDICTION

The jurisdiction of this Court under Section 240 of the Judicial Code as amended is conceded.

STATEMENT OF THE CASE

For the sake of convenience the case of Hinton v. Seaboard Air Line Railroad Company, et al., hereinafter will be called the *Hinton* case or action; the case of Palmer, et als. v. Seaboard Air Line Railroad Company, et als., will be called the *Palmer* case or action; the United States District Court for the Eastern District of Virginia will be called the *Virginia Court* and the United States District Court for the District of Columbia will be called the *District of Columbia Court.*

The case of Graham v. Seaboard Air Line Railroad Company, referred to in Petitioner's Brief as the *Graham* action, upon petitioner's motion, was stayed by the District of Columbia Court because of the pendency of the *Hinton* action and is properly no part of this case except as an example of the difference between the *Hinton* case and the *Palmer* case.

* * * * * * * * * *

In its attempt to convince this Court that the Palmer action is within the *lis pendens* of the Hinton action and that the holding of jurisdiction of the *Palmer* case by the District of Columbia interferes with the jurisdiction of the Virginia Court in the *Hinton* case, petitioner has presented an interpretation of the facts which distorts the situation that is before this court. For the purpose of greater accuracy respondents restate the facts as follows:

Facts

Respondents David Hinton and Adam Wright are Negro locomotive firemen employed by the Seaboard Air Line Railroad Company, petitioner herein. The Brotherhood of Locomotive Firemen and Enginemen (hereinafter called

the Brotherhood) is an unincorporated labor union composed of white locomotive firemen and enginemen. It is the representative under the Railway Labor Act, 45 U. S. C., Chapter 8, of the entire craft or class of locomotive firemen employed by petitioner, as well as the statutory representative under said Act of the entire craft or class of locomotive firemen employed by the other railroads in the Southeastern section of the United States (commonly called the Southeastern Carriers). The white locomotive firemen, members or potential members of the Brotherhood, constitute the majority of the craft or class of firemen on the Seaboard and all the other Southeastern carriers. The Negro locomotive firemen on said carriers constitute the minority of the craft or class, and are excluded from membership in the Brotherhood solely because of race. In both the *Hinton* and the *Palmer* cases Negro locomotive firemen complain of acts of the Brotherhood as their statutory representatives under the Railway Labor Act, charging the union with taking advantage of its statutory bargaining position to try to drive them out of employment for the benefit of the white locomotive firemen, its members and potential members. The acts upon which the *Palmer* case is based occurred subsequent to the acts upon which the *Hinton* case is based, and subsequent to the filing of the *Hinton* action. Since the relationship of the parties in the *Hinton* case and that of the parties in the *Palmer* case and their relative rights and duties stem from the same source many of the allegations to show the relationship and the relative rights and duties are substantially the same in each case.

The Hinton Case

The *Hinton* case is founded (1) on the Southeastern Carriers' Conference Agreement, negotiated by the Brotherhood as statutory representative of the entire craft of locomotive firemen on the carriers involved, February 18, 1941, with the Seaboard and other Southeastern carriers, which

provided that the proportion of non-promotable firemen and helpers on other than steam power * shall not exceed fifty percent in each class of service; that until such per centage is reached on any seniority district only promotable men will be hired and all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men; and other provisions further restricting the employment and seniority rights of non-promotable firemen. And (2) on the Agreement of May 15, 1942 negotiated by the Brotherhood with the Seaboard which provided, among other things, that promotable firemen only should be assigned to service on diesel and other than steam locomotives, and that there should be established a 60-40 proportion of white and colored firemen.

On February 12, 1947, respondent Hinton filed in the United States District Court for the Eastern District of Virginia a class action on behalf of himself and all other Negro locomotive firemen employed by the Seaboard, against the Brotherhood and the Seaboard to set aside the two agreements aforesaid, on the ground that in negotiating and maintaining these agreements the Brotherhood violated the statutory fiduciary duty owed by the Brotherhood as statutory representative under the Railway Labor Act to respondent Hinton and his class. Hinton prayed for a declaratory judgment defining the correlative rights and duties of the parties; for discovery by the Brotherhood of all propositions made and agreements pending or negotiated

---

* By railroad practice locomotive engineers are drawn from the ranks of locomotive firemen by promotion of the firemen after passing certain promotion examinations. Negro firemen are never permitted to become engineers, never permitted to take the promotion examinations, and are classed and commonly spoken of in the railroad industry as "nonpromotable firemen" to distinguish them as a class from the white firemen who are known as "promotable firemen."

When a fireman is used on a diesel engine or any other engine except steam power, he is known as a "helper."

The Southeastern Carriers' Conference Agreement, February 18, 1941, has already been ruled an unfair discrimination by the Brotherhood against Negro firemen. See *Steele v. L & N RR. Co.*, 323 U. S. 192; *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210; *Tunstall v. Brotherhood, etc.*, 69 F. Supp. 826; *Brotherhood, etc. v. Tunstall*, 163 F. (2d) 289 (4th Cir.); certiorari denied, 332 U. S. 841.

by it with the Seaboard, and all other actions taken by it as representative under the Railway Labor Act of the entire craft of firemen employed by the Seaboard, which in any manner curtail the job assignments or seniority or employment rights of the colored firemen; for a permanent injunction against the Brotherhood acting as the Seaboard firemen's class representative under the Railway Labor Act so long as it refused to represent the colored firemen fairly and impartially and in good faith, and to give them opportunity to be heard and a report on all actions adversely affecting their employment rights; and for damages for his individual losses resulting from the Brotherhood's breach of its statutory duties as collective bargaining representative under the Railway Labor Act.

From the beginning of the case Hinton has been represented by his present counsel, respondents Houston and Waddy, and local counsel Oliver W. Hill, Jr., of Richmond, Virginia.

On Hinton's motion, and after due hearing, the Court on December 30, 1947 entered its Findings of Fact, Conclusions of Law and Injunction *pendente lite* (R. 17) to the effect that (a) when diesel locomotives should thereafter be substituted by the Seaboard for steam locomotives on any regular assigned run or runs then held by a nonpromotable fireman and a vacancy is created, or where any vacancy occurs on any assignment then using diesel power, the Seaboard and the Brotherhood should be restrained and enjoined from denying non-promotable firemen preference over such run or runs in accordance with their seniority provided they are otherwise qualified for such assignment, and (b) from denying nonpromotable firemen the opportunity to qualify for service on diesel locomotives, and when qualified to bid for any assignment thereafter open on which diesel power should be used, to which his seniority would otherwise entitle him to under the rules and working conditions (except as to the restrictions against their promotability) as set forth in the agreement of May 15, 1942, as amended

and supplemented and currently in effect, and (c) from denying any nonpromotable firemen who should decline or fail to qualify for service on diesel power, the right to exercise his seniority on steam assignments. The injunction order further provided:

> "... that leave is reserved to any party in interest to apply for an amendment, modification, or enlargement of this order after reasonable notice."

This injunction *pendente lite* order is still in effect, and the case is on the District Court calendar for final hearing on the merits.

The Palmer Action

The *Palmer* action (in which respondent Adam Wright is co-plaintiff) is founded on matter occurring subsequent to all the action heretofore set forth in the Hinton case: to wit—on a Notice served *January 26, 1948* on the Seaboard and the other Southeastern carriers by the Brotherhood acting as collective bargaining representative of the entire craft or class of firemen on the Seaboard and other carriers, proposing changes in the collective bargaining agreements governing the locomotive firemen on said carriers in the following respects:

> "1. All firemen and helpers now in service or hereafter employed shall be in line for promotion to the position of locomotive engineer. Each fireman and helper shall be called in seniority order and required to take examinations for promotion. Those who pass such examinations and meet all other requirements for promotion will be promoted to engineer. *Those who decline to take the examinations or fail to qualify for promotion shall be dismissed from the service.* (Italics ours).
>
> "2. All firemen and helpers who hertofore failed to pass, declined to take, or were not called for promotional examinations shall, subject to the provisions of Section 1 above, be called for promotion and required

to pass the necessary examinations and otherwise qualify for promotion within a reasonable length of time (to be agreed upon) from the effective date of this agreement.

"3. Eliminate all provisions of existing agreements which limit in any manner the exercise of seniority of firemen and helpers, hostlers and hostler helpers."

The Brotherhood requested the carriers, under the provisions of the Railway Labor Act, to set a date within 30 days from the date of the Notice to begin negotiations under said Notice.

On February 17, 1948 three Negro firemen (George Palmer, employed by the Southern Railway Company; Eugene Carter, employed by the Atlantic Coast Line Railroad Company; and *Adam Wright,* employed by the Seaboard) filed a class suit on behalf of all the Negro firemen employed on their respective systems, in the United States District Court for the District of Columbia against the Southern, the Coast Line, the Seaboard and the Brotherhood, to restrain the Brotherhood and the carriers from entering into any agreement embodying the proposals contained in said Notice (particularly proposals "1" and "2"). They charged that the Notice was a Brotherhood scheme to drive the old Negro firemen out of service; that it was formulated and served without notice or opportunity given the Negro firemen to be heard; that nobody participated in the formulation of the Notice except Brotherhood officers and that nobody ever participated in collective bargaining proceedings conducted by the Brotherhood except Brotherhood officers; that by reason of being excluded from membership in the Brotherhood they had no chance to elect, censure or remove the Brotherhood officers who conduct collective bargaining proceedings for the Brotherhood and hence are deprived of any effective voice in the protection of their collective bargaining rights. In addition to praying that the Brotherhood and the carriers be enjoined from entering into any agreement based on the Notice of January

26, 1948, the plaintiffs prayed that the Brotherhood be enjoined from acting as the collective bargaining representative of the Negro firemen under the Railway Labor Act so long as it refused to give them notice of its proposals affecting their interests as members of the firemen's craft; opportunity to participate in the choice and control of those agents or officers of the Brotherhood who handle collective bargaining and grievance adjustments for the craft or class; opportunity to participate in determining the position of the Brotherhood as representaive under the Railway Labor Act on matters concerning rates of pay, rules and working conditions of the craft, and other matters affecting their economic welfare; and full and prompt disclosure of all actions taken by it affecting their interests as members of the craft or class; and for compensatory and punitive damages.

Plaintiffs in the *Palmer* case have been represented at all times by respondents Houston and Waddy as their counsel.

Plaintiffs moved in the *Palmer* case for an injunction *pendente lite*. The Seaboard appeared specially and moved that the complaint be dismissed or in the alternative, stayed as against it until after the disposition of the *Hinton* case, giving as reason therefor the same grounds that are here urged in support of its petition for certiorari. The District of Columbia Court denied the Seaboard's motion and the Seaboard did not appeal from that order. The Brotherhood appeared generally and moved to dismiss for want of jurisdiction and no cause of action stated. After argument, on April 13, 1948 the Court overruled the motions to dismiss; and on April 29, 1948 filed its Findings of Fact and Conclusions of Law and Order for the injunction *pendente lite* prohibiting the Brotherhood and the carriers from entering into any agreement embodying the substance of proposals "1" and "2" in the Notice of January 26, 1948 *supra*.

The Brotherhood sought and secured a special appeal

from the order granting the injunction *pendente lite* and that appeal is now pending before the United States Court of Appeals, District of Columbia circuit.

More Hinton Case

After the United States District Court for the District of Columbia had overruled its motion to dismiss in the *Palmer* case, the Seaboard, on April 27, 1948 filed its petition in the *Hinton* case in the United States District Court for the Eastern District of Virginia alleging that the *Palmer* case was essentially the same as the *Hinton* case and within the *lis pendens* of the *Hinton* case; that Adam Wright as a member of the class of Negro firemen employed by the Seaboard was adequately represented by Hinton, and that Wright and his two counsel, Houston and Waddy, should therefore be enjoined from proceeding further against the Seaboard in the *Palmer* case in the United States District Court for the District of Columbia.

At the hearing on the petition, May 18, 1948, the Brotherhood joined in the Seaboard's petition. Houston and Waddy opposed and moved orally in open court that it be dismissed.

On June 8, 1948 the Court entered its order enjoining Adam Wright and the class he represents, and his counsel Houston and Waddy from further prosecution of the *Palmer* case in the United States District Court for the District of Columbia as against the Seaboard and as against the Brotherhood as the statutory representative of the entire craft or class of locomotive firemen employed by the Seaboard, and ordering them to dismiss the *Palmer* case as against these two defendants.*

* Contrary to the statement in the footnote on page 2 of petitioner's brief the consent of the District of Columbia Court for the *dismissal* of the *Palmer* case as to the Seaboard and the Brotherhood was neither sought nor given, for on motion of respondents to stay the order of June 8, 1948, the Virginia Court by order dated July 31, 1948, stayed so much of its order as required respondents to *dismiss* the *Palmer* case. The Virginia Court did require respondents Houston and Waddy, as attorneys for respondent Wright and his class to apply to the District

Respondents appealed to the United States Court of Appeals, Fourth Circuit, from the order of the Virginia Court dated June 8, 1948, and on November 8, 1948, said Court of Appeals reversed the order of June 8, 1948. Petitioners now seek a writ of certiorari to review that decision.

QUESTION PRESENTED

The sole question presented is whether the pendency of the *Hinton* action in the Virginia Court is ground for the Virginia Court to enjoin the prosecution of the *Palmer* case in the District of Columbia Court.

SUMMARY OF ARGUMENT

The *Hinton* case and the *Palmer* case are separate causes of action, based on different facts arising at different times and involving separate and independent breaches by the Brotherhood of its statutory duty under the Railway Labor Act, 45 U. S. C. A., Sec. 152, et seq., to represent all members of the craft or class fairly and impartially and without hostile discrimination. The doctrine of *lis pendens* is not applicable in the present situation. There is no *res* involved. The only area open to the Virginia Court in the *Hinton* case is the application of the rule of law laid down by this Court in *Steele* v. *L & N RR Co.*, 323 U. S. 189, to the factual situation presented. There is no conflict between the decision of the Fourth Circuit in the instant case and that of the Third Circuit in *Crosley Corporation* v. *Hazeltine Corporation*, 122 F. (2d) 925, because the subject matter involved in the nine infringement suits that were enjoined in the *Crosley* case was identical with that which already was being litigated in the declaratory judg-

---

of Columbia Court for an order *vacating* as to the Seaboard and the Brotherhood as representative of Seaboard firemen the order for injunction *pendente lite* entered in the District of Columbia Court April 27, 1948. In compliance with that requirement respondents Houston and Waddy did present to the District of Columbia Court an order to vacate the injunction *pendente lite*. That order was entered by the District of Columbia Court after all of the defendants had consented thereto.

ment suit; while the subject matter of the *Hinton* and *Palmer* cases is separate and distinct.

Since the injunction of the Virginia Court restraining the prosecution of the *Palmer* case was not necessary for the protection of its jurisdiction it was error for that court to sit in review on the decision of the District of Columbia Court.

If petitioner felt itself aggrieved by the order of the District of Columbia Court denying its motion to dismiss or stay the *Palmer* case, its remedy was by appeal. Its application to the Virginia Court for an injunction restraining the prosecution of the Palmer case was a collateral attack upon the decision of the District of Columbia Court.

ARGUMENT

Preliminary

The statement of the "question presented" as posed by petitioner is misleading in that it *assumes* that the subject matter of the *Palmer* case is within the *lis pendens* of the *Hinton* case and also *assumes* that an injunction restraining the prosecution of the *Palmer* case is necessary for the protection of the jurisdiction of the Virginia Court in the *Hinton* case. Respondents raise no question concerning the general proposition that a Federal court first acquiring jurisdiction of the parties and subject matter in an action may protect its jurisdiction by enjoining another action in another Federal court when the second action is within the *lis pendens* of the first action. However, the questions involved in this case are: *Is* the subject matter of the *Palmer* case within the *lis pendens* of the *Hinton* case?, and *Is* an injunction restraining the prosecution of the *Palmer* case necessary for the protection of the jurisdiction of the Virginia Court in the Hinton case? Respondents submit that these questions must be answered in the negataive and that the Fourth Circuit Court of Appeals correctly held that the Virginia Court erred in restraining respondents from prosecution of the Palmer suit.

I. The Palmer Case Is Not Such a Reiteration of the Hinton Case as to Make It Sufficiently the Same Cause of Action to Bring It Within the Lis Pendens of the Hinton Case.

The *Palmer* case and the *Hinton* case are separate causes of action, based on different sets of facts and arising at different times, involving separate breaches by the Brotherhood of its statutory duty of fair representation of the minority Negro firemen employed on the Seaboard in its capacity as collective bargaining agent under the Railway Labor Act for the entire craft or class of locomotive Firemen employed by the Seaboard.

See *Steele* v. *L. & N. R. R. Co.*, 323 U. S. 192, *supra.*

Every fact on which the *Hinton* case is based occurred prior to the time the first fact in the *Palmer* case occurred.

If the *Hinton* case as now framed were completely tried and disposed of, it would not touch the *Palmer* case. The *Hinton* case could be decided either for the plaintiff or the defendants, without in any way creating a conflict of jurisdiction or decision with the *Palmer* case, regardless how the Palmer case may be decided.

The rule of law establishing the limits of the duty of the brotherhood to the minority non-member Negro firemen as collective bargaining agent under the Railway Labor Act for the entire craft or class of locomotive firemen employed by the Seaboard has been authoritatively laid down by this Court in the *Steele* case, *supra*, and the only area open to the United States District Court for the Eastern District of Virginia in the *Hinton* case is the application of the rule of law to the factual situation there presented.

E.g., see the application of the same rule of law to a factual situation on another railroad:

Tunstall v. *Brotherhood*, 69 F. Supp. 826 (U. S. Dist. Ct., E. D. Va.), *supra.*

Brotherhood v. *Tunstall*, 163 F. (2d) 289 (4th Circ., cert. denied, 332 U. S. 841), *supra.*

Suppose January 1, 1948, in Norfolk, X, citizen of Virginia, negligently drives his automobile against Y, citizen of Maryland, seriously injuring him; whereupon Y sues X for his injuries, over the jurisdictional amount, in the United States District Court for the Eastern District of Virginia. Then suppose while this action is still pending on July 1, 1948, X is unfortunate enough to negligently drive his automobile against Y in Norfolk again, seriously injuring him; whereupon Y files a new suit in the United States District Court for the District of Maryland for his injuries sustained in the second accident, over the jurisdictional amount. Proper service is obtained in both cases; the same jurisdictional ground, diversity of citizenship, is invoked in both cases. On what principle of law can the United States District Court for the Eastern District of Virginia enjoin Y in the first suit from proceeding in the United States District Court for the District of Maryland in the second suit? Yet that is exactly what the United States District Court for the Eastern District of Virginia did in the *Hinton* case where the tort was violation of the statutory duty of fair representation by the collective bargaining representative under the Railway Labor Act, instead of a violation of the common law duty of due care in the operation of a motor vehicle.

The principle of *lis pendens* cannot apply in the *Hinton-Palmer* cases any more than it does in the hypothetical automobile cases put. Furthermore, the two suits involved herein were brought for different purposes. The court below properly recognized this difference in purpose as well as the differences in facts. It correctly stated on page 894 of 170 F. (2d), as follows:

> "While both are class suits, the case at bar is brought only in behalf of the colored firemen employed by the Seaboard, and only against that railroad and the brotherhood as their representative, whereas the Palmer case is brought in behalf of all colored firemen employed by the three great southeastern railroad systems, the Seaboard, the Southern and the Coast Line,

and is brought against all three of the railroads and the brotherhood as bargaining representative of the firemen employed by all of them. The purpose of the case at bar is primarily to enjoin enforcement of provisions of contracts already agreed upon between the Seaboard and the brotherhood; the purpose of the Palmer suit is primarily to enjoin the brotherhood and the three southeastern railroads from negotiating in the future with a view to agreeing upon proposals made after this suit was instituted and after an injunction pendente lite had been granted, and also to enjoin the brotherhood from acting as bargaining representative of the firemen so long as it denies them any voice in the matter of bargaining or the selection of bargaining representatives. The two suits had in common the fact that they were grounded upon the rights declared by the Supreme Court in *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, and by this court in the Tunstall case, *supra;* but these rights had already been settled and nothing further was required in that regard. The two suits were to obtain relief from contracts and negotiations that were alleged to deny the rights thus established, and the matters with respect to which relief was asked were substantially different in the two cases."

and further at page 893:

"The complaint filed in that (Palmer) suit, while setting forth the right to be properly represented by their bargaining agent, asked by way of relief nothing with respect to the agreements of February 18, 1941, or May 18, 1942, but confined its prayer for relief to asking that the brotherhood and the railroads be enjoined from negotiating with regard to the proposals of January 26, 1948, and that the brotherhood be enjoined from acting as representative of the colored firemen under the Railway Labor Act, 45 U. S. C. A., Sec. 151 et seq., so long as it refused them any voice in collective bargaining or in the selection of bargaining agents."

It is also perfectly obvious that there is no *res* to be affected by the decision of either court; no status will be

determined by either judgment, because the status is created by the Railway Labor Act (45 U. S. C., Sec. 152-Fourth) and the status of the Brotherhood as the collective bargaining representative of the entire craft or class of locomotive firemen employed by the Seaboard (including the minority non-member Negro firemen) is conceded by all parties. It is generally held that *lis pendens* will not apply unless the litigation concerns some specific thing or property which will necessarily be determined by the termination of the suit.

> See 54 C. J. S. "Lis Pendens," sec. 4, p. 574, and cases cited in *Hinton, et al.* v. *Seaboard, etc., et al.*, 170 F. (2d) 892 at 894.

In a desperate attempt to find a conflict between the decision of the court below in the instant case and the decision of the Third Circuit in *Crosley Corporation* v. *Hazeltine Corporation*, 3 Cir. 122 F. (2d) 925, petitioner argues that the *Crosley* case established a special rule of law applicable to suits in which a declaratory judgment is asked. Respondents submit that no such special rule was established and further that there is no conflict between the decisions. In the *Crosley* case the nine infringement actions brought after the filing of the declaratory judgment action *involved the same patents* as were involved in the declaratory judgment suit. Such is not the situation here for the *Palmer* case ". . . asked by way of relief nothing with respect to the agreements of February 18, 1941, or May 18, 1942 . . .", the subject matter involved in the *Hinton* case, but sought to prevent the Brotherhood from entering into any agreement embodying proposals submitted by it to the carriers on January 26, 1948. These proposals were not in existence at the time the *Hinton* action was filed nor even at the time the injunction *pendente lite* was issued in that case. The prayer for a declaratory judgment in the *Hinton* case was necessarily based on and confined to the facts alleged in that case at the time the complaint was filed.

The only way in which petitioner can argue that the *Palmer* case is a reiteration of the *Hinton* case is to contend that since plaintiff class on the Seaboard is the same and the Seaboard defendants are the same, and the right of the plaintiff class and duty on the Brotherhood are the same in both cases, that everything the Brotherhood does against the plaintiff class in breach of its duty, no matter when it may occur up to the moment of final judgment in the case first filed, constitutes substantially the same cause of action. A mere statement of the matter demonstrates its absurdity.

II. While Respondent Wright Might Have Intervened In The Hinton Case To Assert His Cause of Action Alleged In The Palmer Case He Was Not Required To Do So and The Virginia Court Erred When It Enjoined Him and His Counsel From Prosecuting The Palmer Case In The District of Columbia Court.

Herein we distinguish between compulsory and permissive joinder of causes of action.

> Federal Rules of Civil Procedure, Rule 18(a).

We are not here faced with the situation of splitting a single cause of action.

> Cf. *Miller* v. *United States Gypsum Co.*, 96 F. (2d) 69 (2d Circ.)

We are dealing with independent, multiple legal wrongs, inflicted by the same defendant, the Brotherhood, upon the same class, the minority non-member Negro firemen employed by the Seaboard. We concede that Wright might have intervened in the *Hinton* case as a member of the class represented by Hinton to complain of the Brotherhood action in formulating and serving the Notice of January 26, 1948, *supra*. The question here, however, is whether

the United States District Court for the Eastern District of Virginia can force him to do so.

To make a further distinction, this is not the usual case where a Court stays its own proceedings to await the outcome of allied litigation in another court.

> See *Landis* v. *North American Co.*, 299 U. S. 248, 81 L. ed. 153, and annotation 81 L. ed. 161;
> *American Life Ins. Co.* v. *Stewart*, 300 U. S. 203, 81 L. ed. 605.

This is not a case in which the United States District Court for the Eastern District of Virginia issued its injunction for the protection of its own jurisdiction, because as pointed out above no decision in the *Palmer* case could have affected either the jurisdiction of the Court or its decision in the *Hinton* case.

If the *Hinton* case were not pending, no possible argument could be made that the United States District Court for the District of Columbia was not a proper forum for the *Palmer* case, and the fact that the Hinton case was pending at the time the *Palmer* case was filed could not oust the United States District court for the District of Columbia of its jurisdiction. The construction most favorable to appellees would be that United States District Court for the Eastern District of Virginia and the United States District Court for the District of Columbia had co-ordinate jurisdiction, which on the assumption the causes of action were the same, would justify one of the two courts in staying its own proceedings until the determination of the issues by the second court.

> See *Old Charter Distillery Co.* v. *Continental Distilling* 59 Supp. 528 (D. C. Del);

However, the causes of action were not the same, for the *Hinton* action represented an attempt to set aside two completed agreements alleged to be discriminatory as to the minority non-member Negro firemen, while the *Palmer*

case represented their resistance to a threat by the Brotherhood to institute a new discriminatory practice and the basis of the complaint is that the Notice of January 26, 1948, was another, independent and different attempt at discrimination by the Brotherhood against the minority non-member Negro firemen.

Moreover, the motion to dismiss or stay because of the pendency of the *Hinton* case had been made in the District of Columbia Court and denied. One court will be very chary in enjoining proceedings in another court of equal jurisdiction;

> *Sorley* v. *Brewer,* 18 How. Pr. (N. Y.) 509
> *Wallace, M & Co.* v. *Leber,* 67 N. J. L. 26, 50 A. 586.

and since it was not necessary for the protection of its own jurisdiction, it was error for the United States District Court for the Eastern District of Virginia to sit in review on the decisions of the United States District Court for the District of Columbia.

> *Toledo Scale Co.* v. *Computing Scale Co.* 261 U. S. 399, 67 L. Ed. 719.

III. The Petition of The Seaboard To Restrain Respondent Wright and His Counsel From Prosecuting The Palmer Case Constituted A Collateral Attack On The Order of The District of Columbia Court Denying The Seaboard's Motion To Dismiss or Stay.

The petitioner herein appeared specially in the District of Columbia Court in the *Palmer* case and moved that the case be dismissed or, in the alternative, stayed as against it because of the pendency of the *Hinton* action in the Virginia Court. The District of Columbia Court denied the motion and entered its preliminary injunction. If petitioner felt that the District of Columbia Court committed error when it denied the motion its remedy was an appeal to the United States Court of Appeals, District of Columbia Circuit. Its subsequent petition to the Virginia Court

for an injunction in the *Hinton* case to restrain respondents from prosecuting the *Palmer* case was a collateral attack on the decision of the District of Columbia Court.

> *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, *supra.*

Petitioner persistently has sought to bring the case of *Graham, et als.* v. *Seaboard Air Line Railroad Company, et als.*, into these proceedings. Its argument seems to be that since the District of Columbia Court stayed the *Graham* action because of the pendency of the *Hinton* suit, it also should have stayed the *Palmer* action. If such is its purpose in bringing the *Graham* case into this proceeding it overlooks completely the essential difference between the cases. The *Graham* case was a class action brought by twenty-one Negro locomotive firemen employed by the Seaboard, the Atlantic Coast Line and the Southern Railroad Companies, against those companies and the Brotherhood to enjoin the enforcement of the Southeastern Carriers Conference Agreement of February 18, 1941—*the identical agreement involved in the Hinton case.* The District of Columbia Court recognized this identity of subject matter and, on motion of the Seaboard, petitioner herein, stayed the *Graham* action as to petitioner and the Brotherhood as the representative of the Seaboard firemen. The same judge in the District of Columbia Court found that the subject matter in the *Palmer* case was different from the subject matter involved in *both the Hinton and the Graham cases* and refused to stay the prosecution of the *Palmer* case.

It is abundantly clear, therefore, that petitioner's real purpose in seeking in the Virginia Court an injunction against the prosecution of the *Palmer* case in the District of Columbia Court was to secure the identical relief which had been denied it by the District of Columbia Court. The Court below aptly observed that:

> "Orderly procedure would require that this decision, if erroneous, be reversed by appeal and not by in-

junction from a court of coordinate jurisdiction which had no *res* within its control requiring protection."

Hinton, et als. v. *Seaboard, etc., et al.*, 170 F. (2d), 892 at 895.

Petitioner states in its petition herein at page 17 that the above language ". . . ignores the fact that the Virginia Court only took its action to protect *its* jurisdiction which had already been invaded by the injunction of the District of Columbia Court. The petitioner submits that it is the action of that Court, not that of the Virginia Court, which is a proper subject of criticism." Respondents have hereinabove demonstrated that the injunction restraining the prosecution of the *Palmer* case was not necessary to protect the jurisdiction of the Virginia Court. They now submit that the above quoted statements of petitioner reveal beyond any shadow of doubt that its real purpose in seeking the injunction against the prosecution of the *Palmer* case was to set aside the order of the District of Columbia Court denying its motion to dismiss or stay and that this petition for a writ of certiorari is a persistent continuation of that collateral attack on the District of Columbia decision.

CONCLUSION

Respondents respectfully submit that the writ of certiorari should be denied.

Respectfully submitted,

JOSEPH C. WADDY, *Pro se,*
CHARLES H. HOUSTON, *Pro se,*
and with
OLIVER W. HILL,
Attorneys for Respondents

JOSEPH C. WADDY,
CHARLES H. HOUSTON,
615 F Street, Northwest
Washington, D. C.
OLIVER W. HILL,
623 North Third Street
Richmond, Virginia